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IN THE

Supreme Court of the United States

_____ Term, 1973

No. 73-709

HOISTING AND PORTABLE ENGINEERS LOCAL 450 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *Petitioner*

v.

PENCE CONSTRUCTION CORPORATION, *Respondent*

Petition for Writ of Certiorari to Review the Decision of the United States Court of Appeals for the Fifth Circuit

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Hoisting and Portable Engineers Local 450 of the International Union of Operating Engineers, AFL-CIO, Petitioner, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 30, 1973. The Petition for Rehearing was denied on October 18, 1973.

OPINIONS BELOW

The order of the District Court is unreported, but will be found in the Appendix pages 15-16, and the Statement in Lieu of Transcript upon which the order was based will be found in the Appendix pages 17-19.

The opinion of the Circuit Court of Appeals (Appendix pages 20-29) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 30, 1973 (Appendix pages 30-31). A petition for rehearing was filed by Petitioner on October 4, 1973, was denied on October 18, 1973 (Appendix page 32), and mandate was stayed thereafter in due course. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Whether a Federal District Court, in an action under 29 U.S.C., Section 185(a), can and should award damages for a breach of a collective bargaining contract to a party who committed a prior breach of the same agreement.

2. Whether a strike caused by an employer's refusal to conform with safety measures requested by the Union is in violation of a no-strike clause or whether it is protected activity falling outside of the no-strike provisions of a collective bargaining contract?

3. Whether it was error in the Courts below to exclude the testimony of Robert L. Johnson, Business Representative of the Petitioner, on the grounds that it was irrelevant to the matters before the Court.

STATUTES INVOLVED

The statutory provisions herein involved are Sections 301(a) and 502 of the Labor Management Relations Act and Rule 43 of the Federal Rules of Civil Procedure, reading, in order as previously mentioned:

29 U.S.C., Section 185(a):

"Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U.S.C., Section 143:

"Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

28 U.S.C., Rule 43(a):

"In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore

applied in the Courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the Courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

STATEMENT OF THE CASE

This action arises from facts which are not in dispute and which are set out as follows:

Pence Construction Corporation contracted and agreed to act as the general contractor for the construction of a plant for Texas Instruments, Inc, at 12201 Southwest Freeway, Stafford, Texas. Pence then entered into a working agreement with Petitioner Union on April 1, 1969, which was in effect until March 31, 1972, and was most certainly in effect at the time the events surrounding this dispute occurred.

On or about January 16, 1970, Pence discharged from its employment one Charles E. Fitts, a shop steward, by terminating him at the Texas Instruments job site. Fitts was regularly employed as an operating engineer for Pence and had also been appointed shop steward for the Union. Later, he was elected "building trades steward" and represented all employees on the job sites in that capacity. It was contended by the Union that Mr. Fitts' discharge occurred because of his insistence that the Company rectify the unsafe conditions then existing on the premises. This was his duty as steward and the Union further contended that his discharge was therefore

in violation of the working conditions of the agreement then in existence.

As a result of these occurrences, namely, Mr. Fitts' discharge, the breach of the collective bargaining contract, and the company's refusal to comply with the safety measures requested by the shop steward, the Union engaged in picketing at the Texas Instruments job site beginning on or about January 19, 1970. The following day, the Company filed application in the 113th Judicial District Court of Harris County, Texas, for a temporary restraining order, to keep the Union from picketing and striking. The Court issued such a restraining order on January 21, 1970, restraining the Union from these actions, but in addition, ordered the Company to reinstate Mr. Fitts to his previous employment status.

On January 21, 1970, the Union filed a petition for removal of the case to the United States District Court for the Southern District of Texas. On January 26, 1970, the District Court ordered the Union to submit to the grievance and arbitration pursuant to the collective bargaining agreement. After arbitration was initiated, the arbitrator found that the Company had breached the contract in discharging Mr. Fitts because of his insistence that the Company make the premises safe for the workers and ordered that he be reinstated with full seniority and back pay. In addition, the arbitrator found the Union in direct violation of Article 5 of the collective bargaining contract by maintaining a picket line at the job site and the Union was ordered to cease and desist from such activity.

Following the arbitration decision, Pence Construction Corporation filed a motion to enforce the arbitrator's award and partial summary judgment on the question of

liability. The Federal District Court adopted the arbitrator's decision and awarded damages pursuant to its cause of action under Section 301 of the Labor Management Relations Act.

On appeal, the Circuit Court of Appeals for the Fifth Circuit, affirmed the lower Court decision. The Union contended, on appeal, that it should not be held liable for damages because the Company was guilty of a prior breach of the bargaining contract which, under Texas contract law, would relieve the other party from any further obligation to comply with its provisions. The Court rejected this contention and said the application of state law to a suit under Section 301(a) of the Labor Management Relations Act would be totally inappropriate. The Court further held that Federal Labor Policy does not view collective bargaining agreements as ordinary contracts. "Federal Labor Law contemplates damage awards for strikes in violation of collective bargaining agreements, and no exception to that rule has ever been made for situations involving a prior breach of the agreement by the employer."

In answering the question as to the Union's "strike procedures", the Court of Appeals disallowed the Union's contention that Pence Construction Corporation was not entitled to damages because this particular strike involved safety conditions and thus was protected activity. The Court felt there was no evidence to indicate the Union merited the protection which "safety strikes" are given, as the firing of a safety protagonist was not proof of unsafe work conditions.

The Court of Appeals dealt very briefly with the issue involving the exclusion of the testimony of Robert L. Johnson, business representative of the Union, and merely

said that even if the trial judge should have ruled in favor of admissibility, his failure to do so did not substantially affect the rights of the parties and thus did not constitute reversible error.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets state contract law in such a manner as to place the decision in direct conflict with applicable Texas State Law, as well as being in direct conflict with other Federal Court decisions. Furthermore, the issue involving the Union's alleged safety strike was decided below in such a manner as to place it in conflict with decisions of other Courts of Appeals on the same matter and the exclusion of testimony of Robert L. Johnson, a pertinent witness in this case, upheld by the Court of Appeals, is also in contravention of decisions of other Courts of Appeals in similar type situations.

I.

The first question raised by the decision of the Court of Appeals is why the Company should be entitled to damages for the Union's alleged breach of the bargaining contract when the Company was found to have committed a prior significant breach of the contract.

The decision below in this cause is in direct conflict with the settled law of the State of Texas. It is settled law in Texas that when one party to a contract first violates such contract in a material respect, it no longer creates an obligation upon the other party to the contract to comply with its provisions. *Wittenburg v. Groves,* 208 S.W. 901, (Texas Commission of Appeals, 1919, holding approved). This case involved a suit for specific performance on a contract for the sale of land and the Court

found that the moving party was not entitled to his remedy since he had committed a prior breach of the contract by repudiating its terms. Although *Wittenburg*, supra, was not a case involving a labor contract situation, it does indicate the general contract law in Texas on a prior breach of a contract. A more recent case involving a collective bargaining agreement is *McBride v. Beaumont City Lines, Inc.*, 356 S.W.2d 395, (Tex. Civ. App. —Beaumont, 1962). This case involved a suit by an employee against his employer for fringe benefits due him under a collective bargaining agreement existing between the parties. The employee had quit and the employer alleged that the suit should be barred since the employee had failed to comply with the grievance procedure set out in the contract. It was found that the employer himself had failed to submit the grievance in the proper procedure and had refused to discuss the matter. The Court held that having failed to perform the condition precedent imposed upon him by the terms of the agreement, the employer was estopped from urging the same as a bar to the employee's suit. Furthermore, it was held that the employer, having wrongfully failed to submit the grievance to the designated procedure, waived its right to insist on the grievance procedure.

In the case at hand, the Company refused to arbitrate the issue concerning Mr. Fitts' discharge and summarily discharged him without a proper hearing. Thus, the Company, as a result of the case just mentioned and general equitable principles, should be barred from setting up the no-strike clause as a basis for damages under Section 301(a) of the Labor Management Relations Act.

The Court of Appeals, in its opinion, (Appendix, page 24), takes the position that uniformity in the ad-

ministration of collective bargaining agreements could not be undertaken if the interpretation of Texas contract law was made to apply to collective bargaining agreements. Federal law must control to insure uniformity in the interpretation of collective bargaining contracts in this respect. What uniformity is the Court talking about? The truth is there is no uniformity in this area as exhibited by the few Federal decisions which have been handed down. We submit that the state law is applicable to contract suits under Section 301(a) of the Labor Management Relations Act when it is not in conflict with the purposes of that Section and any state law applied in interpreting the contractual obligations of the parties will be absorbed by the Federal Courts. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 77 S.Ct. 912 (1957). Thus, while Federal substantive law is to govern suits under Section 301(a), the Supreme Court specifically endorsed the application of state law to such suits when faced with an insufficient number of Federal decisions which are in direct conflict with each other.

A recent Federal case in support of the Union's position that damages are proper when the Company itself has previously breached the contract, is found in the Sixth Circuit's decision in *Local Unions v. Robinson,* 415 F.2d 740, (6th Cir., 1969), no writ. The fact situation is quite similar to the case at hand. In that case the employer had become delinquent on his contractual obligation to pay fringe benefits to the Union's pension plan. After giving the employer notice of the grievance, he still failed to comply with the contract. Despite the existence of a no-strike clause in the grievance procedure, the Union struck in support of its claims. The dispute

was submitted by agreement to the grievance procedure, and it was determined that the employer was in part delinquent. The Union then filed a Section 301(a) action for specific performance and the employer counterclaimed for damages alleging a breach of the no-strike clause. The District Court held and the Sixth Circuit affirmed, that the employer was not entitled to recover for the breach of the no-strike clause when the employees struck on the basis of the employer's prior breach of his contractual obligation. This case demonstrates the clear contradiction with the Court of Appeals decision below and further demonstrates the lack of uniformity existing in the federal courts on this important phase of labor law. For this reason Texas contract law should control here, as denoted by *Lincoln Mills, supra.*

We submit that a writ should be granted not merely because the decision below is in conflict with that cited above from the Sixth Circuit, but because of the importance of a correct and uniform interpretation by the courts of the nation of a most vital aspect of labor law. If the interest in the proper construction and administration of that area of the law is to find a practical application, we respectfully submit that this is a case in which a writ of certiorari should be granted.

II.

The Court of Appeals ruled that the Union's strike was not a safety strike and therefore was not entitled to the protection afforded to safety strikes. We submit that this ruling is clearly erroneous and should be reversed.

Section 502 of the Labor Management Relations Act (29 U.S.C., Section 143) provides that employees who in good faith, because of abnormally dangerous conditions

existing at work quit their labor, such will not be deemed a strike under this law. There have been many decisions construing Section 502 of the Act and one of the most predominant is *Gateway Coal Company v. United Mine Workers of America,* 466 F.2d 1157 (1972) in which the Third Circuit refused to enjoin a work stoppage and compel arbitration under Section 301(a) of the Act in a situation where Union members refused to work in a Company's mine as long as the Company retained two supervisors in its employ who had allowed unsafe working conditions to exist for some time. The Court held that a dispute growing out of the safety of a job site and the circumstances in which employees are required to work is sui generis. A refusal to work because of good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract. The Court further held that the *burden of proof was on the Company to show that the employees concern over safety was not in good faith.* Accord, *United States Steel Corporation v. United Mine Workers of America,* 469 F.2d 729 (3rd Cir., 1973).

It follows that damages for breach of contract under Section 301(a) of the Act would not be proper in such a situation as the one here, where safety conditions were at the heart of the dispute. The Court of Appeals was erroneous in its determination that there were no facts to indicate that the Union merited the protection of Section 502 of the Act. The Union offered testimony of Robert L. Johnson, the Union's business representative, which was excluded by the Courts below, which would have confirmed that the Company fired Fitts as a result of his insistence that the job site be made safe for his fellow employees. The Court of Appeals makes the er-

roneous ruling that the firing of a safety protagonist is not proof of unsafe working conditions on the job site. We submit that such a firing is proof of unsafe working conditions, because Mr. Fitts, in his capacity as steward, made continuous demands that the Company comply with the bargaining contract and safety regulations then in effect. As steward he had a duty to his fellow workers to complain of unsafe working conditions, and when the Company fired him, no other conclusion can be reached but that the Company was fearful that Fitts would voice his complaints to others and thus compel the Company to correct the unsafe conditions on the job. Based on this conclusion, the Union had the right to engage in a safety strike with protection afforded them under Section 502 of the Labor Management Relations Act.

III.

The final point for which we request this Court to grant a writ results from the refusal by the Courts below to allow the testimony of Robert L. Johnson, business representative of the Union on the grounds that it was irrelevant to the matters before the Court. Not only is Johnson's offered testimony material to the issues presented by the case, but its relevance to those matters is manifest. It is clear from Johnson's testimony that the Union's decision to picket the job site was made only after the Company had twice refused to arbitrate or negotiate this matter. Surely this testimony is relevant to the damage issue in this case.

Rule 43 of the Federal Rules of Civil Procedure provides that the rule favoring the admissibility of the offered evidence, whether state or federal, shall govern in the District Courts. There are a number of cases construing this rule, but the liberal policy declared in it is perhaps

described best in *U. S. v. Lykes Brothers Steamship Company,* 432 F.2d 1076 (5th Cir., 1970). There, the Court stated that the "liberal construction properly given the rule relating to form and admissibility of evidence favors admission of evidence rather than its exclusion if it is of probative value, and generally doubt should be resolved in favor of the admissibility". (432 F.2d at 1077).

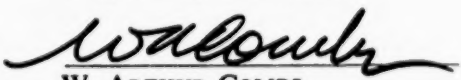
While it is true that relevance and materiality is a matter resting largely within the discretion of the trial court and is not ordinarily reviewable on appeal, *Beaty Shopping Center, Inc. v. Monarch Insurance Company of Ohio,* 315 F.2d 467 (4th Cir., 1963), the erroneous exclusion of evidence has been held to be reversible error. *Krinog v. Federici,* 203 F.2d 203 (3rd Cir., 1953), and *Builder Steel Company v. Commissioner of Internal Revenue,* 179 F.2d 377 (8th Cir., 1950). In the *Builders Steel* case, the Eighth Circuit pointed out that a trial judge, who attempts to make strict rulings on the admissibility of evidence in a non-jury trial, may have his decision reversed if he excludes evidence which the Appellate Court believes should have been admitted. (179 F.2d at 379).

There is no doubt that Johnson's testimony is material and relevant to the question of whether Pence is entitled to damages. The Court of Appeals makes the erroneous ruling that the failure of the trial judge to admit Johnson's testimony did not affect the substantial rights of the parties involved and thus did not constitute reversible error. From any viewpoint, this decision is inconceivable when it is made clear from Johnson's testimony that it was Pence who refused to settle the dispute in an amicable manner pursuant to the grievance procedure set forth in the contract. This fact is definitely evidence that Pence,

having breached the contract, should not be permitted to recover damages for the Union's failure to make use of a grievance procedure the Company itself had forsaken. Johnson's testimony also would demonstrate that the dispute arose out of the safety conditions on the job site. Thus, the probative value is manifest and its materiality to the damage and the safety issues cannot be questioned. Therefore, we submit, it was error to exclude this testimony and since it was the only evidence the Union could offer, its erroneous exclusion was an abuse of discretion and prejudicial error, and is seriously erroneous and should be reversed.

Wherefore, premises considered Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,



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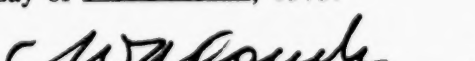
CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition were served on Mr. L. G. Clinton, Jr. and Mr. A. J. Harper, II, attorneys of record for the Respondent, by depositing same in the United States Mail, first class, postage prepaid, certified mail, return receipt requested, addressed to them at 800 Bank of the Southwest Building, Houston, Texas, on this 14 day of NOVEMBER, 1973.



W. ARTHUR COMBS

APPENDIX A

Final Order

(Number and title omitted)
(Filed: September 12, 1972)

This Court hereby adopts the arbitrator Raymond L. Britton's written findings of April 20, 1970, a copy of which is attached hereto, as to the liability of the parties. The arbitrator heard all relevant evidence as to the firing of the union employee. This court has on previous occasions, as it does here, accepted the wisdom of the philosophy of arbitration by letting the arbitrator use the decision powers intended for his office.

> " '[Courts should resist] the temptation to "reason out" a la judges the arbiter's award to see if it passes muster. So it is here. But even under these self-imposed wraps this award shows on its face two things. First, the arbiter was drawing on the collective bargaining agreement as the source both of the dispute and its solution. Second, the award put forward a passably plausible—even if perhaps erroneous—analysis of the interplay of the contractual provisions, *especially in light of the Employer's long practice of wage payment to the very eve of payment day with no withholding of earned wages.* * * * The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.' Id. 390 F.2d at 83-84. (Emphasis added). See also *Western Iowa Pork Co. v. National Brotherhood Packing House & Dairy Workers,* 366 F.2d 275, 278 (8th Cir. 1966)." *Textile Workers Union v. Textile Papers Products, Inc.,* 405 F.2d 397, 400 (5th Cir. 1968).

The Union has argued on motion to this court that no findings of damages should flow from the arbiter's award because the Union's actions were justified. The Union's

position that justification precludes damages is not indicated by the holding in *Packinghouse Workers v. Needham Packing Co.*, 376 U.S. 247, 253 at footnote 5 (1964) where it was held that the employer's allegations that the Union breached the no-strike clause did not release the employer from its duty to arbitrate the Union's claim that the employees had been wrongfully discharged. There the company had a counterclaim against the Union in Iowa state court and the Supreme Court commented: "nothing we have said here precludes it from prosecuting that claim and recovering damages." *Packinghouse Workers v. Needham Packing Co.*, supra at 253. See *Drake Bakeries v. Local 50*, 370 U.S. 254 (1962).

The policy of the national labor laws is to promote arbitration, not strikes. *Teamster Union v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). [There was an absence of a no-strike clause, but the fact that the union struck was a violation of the contract anyway.]

Accordingly, the court is not swayed by defendant's argument.

Because the parties have stipulated as to damages, there is no necessity for further hearings. The agreed stipulation is approved in the sum of $10,450.00 plus interest at the rate of six percent (6%) per annum and costs of Court.

This is a final judgment.

DONE at Houston, Texas, on this 15th day of September, 1972.

s/
United States District Judge.

APPENDIX B

Statement in Lieu of Transcript

(Number and title omitted)
Filed: January 31, 1973)

Comes now the Defendant in the above styled and numbered action, and pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure, submits this STATEMENT IN LIEU OF TRANSCRIPT and would show as the reason therefor that the official transcript made by the designated Court reporter has been lost.

Be it remembered that on the 14th day of August, 1972, the above styled and numbered cause came on to be heard by the Court and both parties, by and through their respective counsel, announced ready for trial, and

Be it further remembered that the only witness presented to testify was one Robert L. Johnson, Business Representative of the Defendant, and that his testimony was excluded as irrelevant by the Court over the objection of Defendant's counsel, and

Be it further remembered that, pursuant to Rule 43(c) of the Federal Rules of Civil Procedure, the Defendant offered the evidence of the witness notwithstanding, and the official Court reporter made a transcript thereof, for which transcript this Statement is now offered.

The witness testified as follows:

My name is Robert L. Johnson. I live at 238 County Fair Drive, Houston, Texas, Telephone No. 447-3146. I am one of the Business Representatives of Operating Engineers Local No. 450, which job I have held for approximately three years.

On or about January 16, 1970, the Pence Construction Company job at Texas Instruments, Stafford, Texas, was a part of my territory which I was obligated to service.

The Engineers' Steward on the job was Mr. Charles E. Fitts. Fitts was also the Building Trades Steward. On January 16, 1970, Fitts was discharged by Pence's Foreman, Irvin E. Mott, Superintendent for Pence Construction Company on such job. Fitts reported the same to me immediately and that afternoon I called Mr. Mott and told him that he had "run my steward off" and told him that he was in violation of our contract and that if he would put the man back to work, I thought we could straighten it out. He said he would think about it. The same night he called me at home and told me that he would not put Fitts back to work. My investigation convinced me that Fitts was fired for Union activities in that he was demanding that the Company comply with our contract and safety regulations. Mott claimed that he fired him because he was an agitator.

I again offered to arbitrate the matter with the Company if they would put the man back on the job pending arbitration, and Mott's reply to this was "there is absolutely no way we can put him back on the job and me remain as Superintendent."

Since the Company violated the working agreement, I felt there was nothing left for the Union to do except to picket the job, which we did. The words on the picket were substantially as follows:

"Violation of Contract and Unfair Labor Practice."

The Company filed suit in State Court and obtained a temporary restraining order, whereupon we took the picket down. Our lawyers then removed the case to

Federal Court and after a hearing in Federal Court, the State Court injunction was declared no longer in force. We then put the picket up and it remained up for two or three days. Whereupon, at another Federal Court hearing, the Court ordered both parties to arbitrate the issue and to put the man back on the job. This was exactly what the Union had been willing to do at all times and had requested the Company to do, as above indicated. Immediately upon the issuance of this order, the pickets were taken down and we proceeded to arbitration.

Be it further remembered that Plaintiff's counsel objected to all of the foregoing on the grounds that it was irrelevant, hearsay and not corroborated.

Whereupon, no further testimony was offered, and the Court then ruled on the basis of all of the evidence before it, including stipulations, the Arbitrator's Decision, etc.

Entered this 31st day of January, 1973.

(Signed)
JOHN V. SINGLETON, JR.
Hon. John V. Singleton, Jr.
United States District Judge.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1334
Summary Calender*

PENCE CONSTRUCTION CORPORATION,
Plaintiff-Appellee,

v.

HOISTING AND PORTABLE ENGINEERS LOCAL 450 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

(August 30, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges

Goldberg, Circuit Judge: In this appeal from an award of damages for losses resulting from a labor strike, we are asked to determine whether a union that has engaged in a strike in violation of a collective bargaining agreement is relieved of liability in damages by reason of the contracting company's prior breach of the same agreement. The United States District Court for the Southern District of Texas held that prior breach does not preclude the payment of damages and awarded the injured company $10,450.00, as stipulated by the parties. We affirm.

The events that bring these litigants before us commenced on January 16, 1970, when Pence Construction Corp. [hereinafter "the Company"] discharged a shop steward Charles Fitts, from his employment as an Operating Engineer at the Company's Texas Instruments, Inc. job site in Stafford, Texas. Shortly before his discharge Fitts had been elected "Building Trades Steward" for Hoisting and Portable Engineers Local 450 [hereinafter "the Union"], and in that capacity represented all employees on the job site. The Company claimed that it had fired Fitts for various unspecified acts of misconduct. The Union claimed that the Company had fired Fitts, in violation of the collective bargaining agreement, for engaging in lawful Union activities. The Union struck and established a picket at the Texas Instruments job site on January 19, 1970.

The following day the Company filed application in state district court for a temporary restraining order enjoining the Union from picketing and striking. The court granted the restraining order, and contemporaneously ordered the Company to reinstate Fitts to his previous employment. The Union then removed the case to federal district court.[1] On January 26, 1970, after renewal of Union picketing, the District Court ordered the Union to submit to grievance and arbitration procedures under the collective bargaining agreement.[2]

The Arbitrator determined that both parties had violated the collective bargaining agreement. He found that the Company had fired Fitts because of activities in his

1. The District Court had original jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (1970).

2. The strike continued on February 2 and 3, 1970, after dissolution of the state court's restraining order.

capacity of Union steward, and ordered that Fitts be reinstated with full seniority and back pay.

Then, holding that the Union had violated Article V of the agreement[3] by establishing and maintaining picket lines on January 19, 20, and 26, and February 2 and 3, the Aribtrator ordered the Union to cease and desist from picketing at the Company's Texas Instruments job site. Prior to the hearing before the Arbitrator, the Company and the Union had entered into a written agreement excluding from arbitration the issue of damages suffered by the Company as a result of the strike.

Following arbitration the Company filed a Motion for Enforcement of Aribtrator's Award in the District Court. The parties entered a Stipulation that the Company had suffered actual damages in the amount of $10,450.00 as a result of the Union's strike and picketing. On September 15, 1972, the trial judge entered a final order adopting the Aribtrator's findings, rejecting the Union's argument that the prior breach of the agreement by the Company precluded damages, and awarding damages to the Company in the amount stipulated by the parties.

Seeking reversal of the damage award in this Court, the Union contends that the District Court erred in three respects: (1) by awarding damages to a party who himself was guilty of a prior breach of the agreement; (2) by awarding damages for an alleged safety strike; and (3) by excluding the testimony of the Union's business

3. "Article V—Grievance Procedure"—"It is agreed that all disputes, other than those pertaining to jurisdictional disputes, that may arise on any job covered by this Agreement shall be handled in the following manner without any person permitting or causing the grievance to cause a work stoppage or interfere in any way with the progress and prosecution of the work. . . ."

representative. We find none of these contentions persuasive.

I.

The parties apparently agree that the District Court's order compelling arbitration was proper.[4] In enforcing the Arbitrator's decision and awarding damages to the Company, the District Court was merely requiring the Union to respond to damages for its breach of contract in the same manner the Company had been required to expend damages, in the form of back pay, for its own breach. We are compelled to uphold this even-handed result, not only by our sense of justice, but also by the unmistakable precedential commands of two decades of federal labor law decisions.

The courts have long recognized that a party who breaches a collective bargaining agreement may be held accountable in damages. See e.g., *Drake Bakeries v. Local 50, American Bakery & Confectionery Workers,* 1962, 370 U.S. 254, 266, 82 S.Ct. 1346, 8 L.Ed.2d 474; *Local 653, Int'l. Union of Operating Eng'rs v. Bay City Erection Co.,* 5th Cir. 1962, 300 F.2d, 270, 272-73. That concept is not challenged by the parties here.

The Union urges, however, that any exception to this well established principle be implied from Texas' general contract law. The Union alleges that, under Texas law, material violation of a contract by one party relieves

4. Indeed, that order was compelled by clear mandate of the Supreme Court in the *Steelworkers* trilogy. United Steelworkers v. American Mfg. Co., 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403, United Steelworkers v. Warrior & Gulf Nav. Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, United Steelworkers v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S.Ct. 1458, 4 L.Ed.2d 1424.

the other party of any further obligation to comply with its provisions. Even assuming the accuracy of this statement of the Texas law, the application of state law to a suit under Section 301 of the Labor Management Relations Act would be wholly inappropriate. In *Textile Workers Union v. Lincoln Mills*, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, the Supreme Court outlined the comparative roles of state and federal law in Section 301 suits:

> "We conclude that the substantive law to apply to suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws . . . Federal interpretation of the federal law will govern, not state law . . . But state law if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy."

Id., 353 U.S. at 456-57, 77 S.Ct. at 918, 1 L.Ed.2d at 980-81.

Uniformity in the formulation and application of labor laws is essential to the effective administration of collective bargaining agreements. *Local 174, Int'l Brotherhood of Teamsters v. Lucas Flour Co.*, 1962, 369 U.S. 95, 103, 82 S.Ct. 571, 7 L.Ed.2d 593, 599. The uniformity so avidly sought clearly would not be well served by the interpretation of Texas contract law offered by the Union. Federal labor policy does not view collective bargaining agreements as ordinary contracts. The collective bargaining agreement is *sui generis*, providing the basis for individual contracts of employment; as such, it has always been a favorite of the law. *J. I. Case Co. v. N.L.R.B.*, 1944, 321 U.S. 332, 88 L.Ed. 762. Because the collective bargaining agreement is the foundation for

a broad network of relationships, the tools to destroy its tensile strength must indeed be sturdy and steady, not weak and reedy. We must not permit the peccadilloes or peculiarities of a particular state, honored and hallowed though they be by time, to undermine a national approach to collective bargaining contracts. Contractual parochialism would destroy that uniformity in construction of such contracts which federal labor policy has made a paramount desideratum.

As indicated above, federal labor law contemplates damage awards for strikes in violation of collective bargaining agreements. No exception to that rule has been established for situations involving a prior breach of the agreement by the employer. To the contrary, grievance procedures constitute an integral part of the collective bargaining contract, so that a dispute over one aspect of the agreement can be resolved without impairing other contractual rights and obligations. In *Drake Bakeries, supra,* the Supreme Court declared that "[a]rbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach." 370 U.S. at 262, 8 L.Ed.2d at 480.

In *Local 721, Packinghouse Workers v. Needham Packing Co.,* 1964, 376 U.S. 247, 84 S.Ct. 773, 11 L.Ed.2d 680, a case involving facts similar to those in the case before us, the Court reaffirmed this position. The company discharged an employee, and 190 union members responded by striking. The company opposed arbitration on the ground that the union had "repudiated and terminated the labor agreement." Rejecting that argument, the Supreme Court held that the duty to arbitrate remained in force even though the union had vio-

lated its agreement, and that the company could prosecute and recover on its claim for damages resulting from the strike.

This Court has recently affirmed a district court decision containing a similar ruling. In *Dow Chemical Co. v. International Union of Electrical Workers,* M.D. Fla. 1971, 82 L.R.R.M. 3169, 3181, aff'd 5th Cir., No. 72-1369, slip op., June 12, 1973, the district court noted that even if the terminations of employees that caused the strike were unlawful, they would not have legitimized the strike, because: grievances concerning the terminations could have been carried through the contractual grievance procedures within a reasonable time; the terminations did not constitute a flagrant unfair labor practice; and the terminations were not of such a nature as to threaten ouster of the union or destruction of the bargaining relationship. These same considerations apply to the case before us. Although situations may arise in which any employer's breach of a collective bargaining agreement will justify a union's breach of a no-strike clause, no such situation has been presented to us here. We therefore hold that the Union was not relieved of liability in damages because of the Company's prior breach of the collective bargaining agreement.

II.

The Union contends also that the District Court erred in awarding damages to the Company because the Union was engaged in a strike involving safety conditions. The principle invoked by the Union is a significant one in a developing area of the law. Section 502 of the Labor Management Relations Act. 29 U.S.C. § 143 (1970) provides in part:

> ". . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

See *Gateway Coal Co. v. United Mine Workers,* 3d Cir. 1972, 466 F.2d 1157, cert. granted 93 S.Ct. 1418; *Hanna Mining Co. v. United Steelworkers,* 8th Cir. 1972, 464 F.2d 565; *Missouri K-T R.R. v. Brotherhood of R.R. Trainmen,* 5th Cir. 1965, 342 F.2d 298; *N.L.R.B. v. Knight Morley Corp.,* 6th Cir. 1958, 251 F.2d 753, cert. denied 357 U.S. 927, 78 S.Ct. 1372, 2 L.Ed.2d 1370, reh. denied 358 U.S. 858, 79 S.Ct. 15, 3 L.Ed.2d 93.

We endorse the philosphy underlying Section 502 and the decisions protecting safety strikes—that the health and safety of working people take precedence over the easing of industrial strife. Nevertheless, we are unable to glean from the briefs or the records herein any fact or shred of evidence to indicate that the Union merits the statute's protection. The Union cites no "abnormally dangerous conditions" and makes no claim that any employee was placed in unusual danger. Neither the Arbitrator nor the District Judge found unsafe working conditions to be the genesis of the employees' exodus. The sole motivation for the strike appears to be the discharge of the Union's shop steward. The Arbitrator found that the steward's insistence that the Company make the premises safe was a reason for his dismissal. The firing of a safety protagonist, however, is not proof of unsafety. That alone, in the absence of any allegation of particular dangerous conditions, is insufficient to make this work stoppage a safety strike. See *Hanna Mining Co. v. United*

Steelworkers, supra, 464 F.2d at 568 n.2. On the basis of the evidence presented, we cannot say that the Arbitrator and the District Court erred in declining to clothe this garden variety strike with the protective garments of Section 502.

III.

Finally, the Union charges that the District Court erred by excluding the testimony of the Union's business representative, Robert L. Johnson. We do not agree.

Johnson was the only witness presented to testify at the District Court's hearing on the Company's damage claim. Upon objection by counsel for the Company, and upon ascertaining that Johnson had previously presented his testimony before the Arbitrator, the Court excluded Johnson's testimony as irrelevant.

The Arbitrator, after hearing Johnson's testimony, had made written findings as to the liability of the parties. The District Court properly adopted a presumption of unarbitrariness about the Arbitrator's findings and chose not to rehear the evidence on which those findings were based. Pursuant to Fed. R. Civ. P. 10(c), the Union has filed a Statement in Lieu of Transcript, containing the evidence witness Johnson would have presented if his testimony had not been excluded. Our examination of Johnson's statement reveals no evidence that would have led the District Court to a different result. We conclude that, even if the trial judge should have resolved his doubts in favor of admissibility, *United States v. Lykes Brothers Steamship Co.,* 5th Cir. 1970, 432 F.2d 1076, 1077, his failure to do so did not "affect the substantial rights of the parties," and thus did not constitute reversible error. Fed. R. Civ. P. 61.

CONCLUSION

The decision of the District Court comports with both law and reason. National labor policy, as implemented by decisions of the federal courts, clearly mandates that the Union not be relieved of liability in damages by reason of the Company's prior breach of the collective bargaining agreement. That policy is not so portable that it may be readily displaced by discordant principles of state contract law. Moreover, we decline to hoist the Union's work stoppage to the protected status of a safety strike. Finally, we find the exclusion of the Union business representative's testimony totally void of merit. Consequently, we uphold the decision of the District Court and affirm its award of recompense to the Company.

AFFIRMED.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 73-1334
Summary Calander

D.C. Docket No. CA-70-H-47

PENCE CONSTRUCTION CORPORATION,
Plaintiff-Appellee,

v.

HOISTING AND PORTABLE ENGINEERS LOCAL 450 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record of the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

August 30, 1973

Issued as Mandate:

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1334
Summary Calander

PENCE CONSTRUCTION CORPORATION,
Plaintiff-Appellee,

v.

HOISTING AND PORTABLE ENGINEERS LOCAL 450 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

October 4, 1973

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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No. 73-789

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

HOISTING AND PORTABLE ENGINEERS
LOCAL 450 OF THE INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO,

Petitioner,

v.

PENCE CONSTRUCTION CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. J. HARPER II
L. G. CLINTON, JR.

Of Counsel,

FULBRIGHT & CROOKER
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Houston, Texas 77002

FIDELITY PRINTING COMPANY, HOUSTON

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No. 73-789

IN THE

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HOISTING AND PORTABLE ENGINEERS
LOCAL 450 OF THE INTERNATIONAL
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Petitioner,

v.

PENCE CONSTRUCTION CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is officially reported at 484 F.2d 398.

The opinion of the United States District Court for the Southern District of Texas is not officially reported and is attached to the Petition for Writ of Certiorari as Appendix "A".

QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, the Company was entitled to recover damages incurred by it as a result of the Union's breach of a collective

bargaining agreement in an action under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

Respondent would respectfully refer this Honorable Court to the opinion of the United States Court of Appeals for the Fifth Circuit (484 F.2d 398, Appendix "C" to the Petition for a Writ of Certiorari) for an accurate and concise statement of the facts of the case. Respondent (hereinafter referred to as "Company") would also submit the following amplification of the facts of the case which are believed necessary to a full understanding of the case.

The Company discharged one Charles E. Fitts, a shop steward, on or about January 16, 1973. The Petitioner (hereinafter referred to as "Union") struck and established picket lines. Contrary to the statement of the case presented by the Union in its Petition (p. 5), the arbitrator, the District Court and the Court of Appeals found that the Union's strike and picketing were motivated by the discharge of Fitts and not because of any unsafe working conditions. The decisions of the courts below are, on this factual matter, clearly supported by the evidence, including the statement of the Union's business representative, Robert L. Johnson.[1]

The second basic fact which should be borne in mind is that it was the Company who sought and compelled arbitration of the dispute. The Union demanded as a condition to any agreement on its part to arbitrate that the Company reinstate Fitts, and the subsequent strike and picketing were conducted in order to compel this reinstatement.

Pursuant to the order of the District Court compelling arbitration of the dispute a hearing was set before an

[1] As set forth in the Joint Appendix before the Court of Appeals, pp. 97-99.

arbitrator. The Union continued its strike and picketing through the day of the arbitration hearing. Prior to the submission of the case to the arbitrator, the parties agreed, by written agreement, to exclude from arbitration the issue of damages suffered by the Company. Following the hearing, the arbitrator issued his decision finding that the Company had violated the contract in discharging Fitts and finding that the Union had violated the contract by striking and maintaining its picket lines. Following the entry of the arbitrator's award, the Company sought enforcement of the award in the District Court and also sought recovery of damages it had incurred as a result of the Union's breach of the collective bargaining agreement. The amount of damages suffered by the Company was stipulated between the parties, and the District Court entered its final order enforcing the arbitrator's award and awarding the Company the amount of stipulated damages. (Appendix "A" to the Petition for a Writ of Certiorari).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CORRECTLY APPLIED FEDERAL LAW IN THE COMPANY'S ACTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 185.

As the Court of Appeals correctly noted (484 F.2d at 400-401), under the decision of this Court in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957), the correct substantive law to apply in suits under Section 301 is federal law. The body of federal law built up by the decisions of this Court and by the Circuit Courts of Appeal clearly establish that the decision of the Fifth Circuit in

this case was correct. This Court, as well as the Circuit Courts of Appeal which have considered the question, has consistently held that one party to a collective bargaining agreement is not relieved of its obligations or responsibilities under that agreement because of a breach of the agreement by the other party. In *Local 721, Packing House Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964), this Court held that a union's strike over the alleged wrongful discharge of an employee in violation of a no-strike clause neither barred the union from seeking to compel arbitration of its claim nor barred the employer from counterclaiming for the damages it had incurred as a result of the union's strike and work stoppage in violation of the no-strike clause *See also Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Ice Cream Drivers* v. *Borden, Inc.*, 433 F.2d 41 (2d Cir.), *cert. denied*, 401 U.S. 940 (1971); *Clothing Workers* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 199 (8th Cir. 1964); and *B.L.F.&E.* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964).

The Fifth Circuit found it unnecessary to determine whether or not the Union's contention regarding the law of Texas was correct since in its view the application of the law of Texas in this regard would not serve the uniform federal labor policy required under Section 301 of the Act,[2] and such determination is totally consistent with and supported by prior decisions of this Court *Local. 721, Packing House Workers* v. *Needham Packing Co.*, 376 U.S.

[2] 484 F.2d at 400. The law of Texas is not as clear as argued by the Union, but rather the law of Texas appears to be that before a breach of a contract by one party relieves the other party of liability under that contract, the breach must be a "material breach" going to the essence of the contract, rendering performance by the second party impossible.

247 (1964). *See also Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Contrary to the Union's assertion in its Petition for a Writ of Certiorari (p. 8), the Company did not refuse to arbitrate Fitts' discharge, but rather, it was the Company who sought to compel arbitration of the dispute. Further, the Company did not deny Fitts a proper hearing under the parties' collective bargaining agreement (J.A., Court of Appeals, pp. 23-35), but, rather, was seeking by its actions in the state district court and in the United States District Court to compel the Union to comply with those procedures and secure the required hearing.

The decision of the United States Court of Appeals for the Sixth Circuit in *Teamster Local Unions* v. *Robinson*, 415 F.2d 740 (6th Cir. 1969), cited by the Union in its Petition for a Writ of Certiorari (p. 9) is clearly inapposite. The contractual provisions in the *Robinson* case contained an *express* exclusion from the general no-strike obligation of the unions and specifically recognized the unions' right to strike in the event the Company was delinquent on its health and welfare payments. No such exclusion, express or implied, is present or asserted in this case. Further, there was no finding by the arbitrator in *Robinson* that the unions' strike violated the contract. Such a finding was made in this case. In short, there is no conflict between the decision of the Fifth Circuit in this case and the decision of the Sixth Circuit in *Robinson*.

II.

THE UNION'S STRIKE IS NOT ENTITLED TO THE PROTECTION OF SECTION 502 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 143.

The Fifth Circuit, in rejecting the Union's contention that its strike was protected by Section 502 of the Act held that there was no evidence to indicate that "abnormally dangerous conditions" existed which imperiled the life or limb of the employees. 484 F.2d at 402. The Fifth Circuit, the District Court, and the arbitrator all concluded that the sole motivation for the strike was the discharge of the Union's steward. 484 F.2d at 402. As this Court has long held, it is a court of law rather than a court for the correction of errors in fact finding, and it does not undertake to review concurrent findings of fact by the courts below. *Garver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

As noted by the Fifth Circuit, there is an absolute dearth of evidence establishing that an abnormally dangerous condition existed or that the strike and picketing by the Union was in any way motivated by such "abnormally dangerous condition." The Union's reliance upon the Third Circuit's decisions in *Gateway Coal Company* v. *United Mine Workers of America*, 466 F.2d 1157 (3rd Cir. 1972) and *United States Steel Corp.* v. *United Mine Workers*, 469 F.2d 729 (3rd Cir. 1972), *cert. pending* are misplaced. This Court has granted certiorari in the *Gateway Coal* case (93 S.Ct. 1418) and oral argument has been presented. The *United States Steel Corp.* case relied exclusively upon the rationale of the *Gateway* case. Here, unlike *Gateway*, there was not and is not any contention or evidence that the lives or limbs of workers were jeopardized or imperiled by any safety condition existing at the project. The alleged, unspecified

unsafe conditions were not at the heart of the dispute in this case, but the Union's strike and picketing were over the discharge of the job steward and the Company's refusal to reinstate him as a condition precedent to arbitration. Indeed, there is no evidence that any grievance was carried to arbitration in connection with such alleged unsafe conditions nor did the Union continue to picket after the arbitrator ordered the reinstatement of the job steward, but rather the picketing ceased and the employees returned to work. This conclusion is clearly supported by the evidence, including the affidavit and testimony of the Union's business representative, Johnson (Joint Appendix, Court of Appeals, p. 96-99).

More in point to the facts of this case is the earlier decision of the Fifth Circuit in *Missouri-K-T R.R.* v. *The Brotherhood of R.R. Trainmen*, 342 F.2d 298 (5th Cir. 1965) and the recent decision of the Eighth Circuit in *Hanna Mining Co.* v. *United Steelworkers*, 464 F.2d 565, 568 n. 2 (8th Cir. 1972). The Eighth Circuit's decision in *Hanna* found *Gateway* inapposite and correctly, it is submitted, stated the principle thusly:

> "The trial court did not make a finding that the employees walked off the job in the good faith belief that the conditions for work were abnormally dangerous, and such a finding is necessary to bring . . . [Section 502] into play."

The essence of Section 502 of the Act is that the conditions are *abnormally dangerous*. No such allegation is made by the Union, even in its Petition for a Writ of Certiorari. Furthermore, the Company would submit that an overly broad reading of this section would open "Pandora's Box" and allow the exception provided in Section 502 to swallow the salutatory principle behind the policy precluding industrial strife through arbitration.

III.

THE EXCLUSION OF THE TESTIMONY OF THE UNION'S BUSINESS REPRESENTATIVE DOES NOT PRESENT AN ISSUE WARRANTING REVIEW BY THIS COURT.

Contrary to the Union's contention in its Petition for a Writ of Certiorari (p. 12), the Company did not twice refuse to arbitrate the discharge of Fitts. Indeed, the evidence establishes without contradiction that the Company was the party who sought and ultimately compelled arbitration of the matter. The only refusal by the Company was its refusal to reinstate Fitts to the job as a condition precedent to arbitration. The exclusion of Johnson's testimony by the District Court and the affirmance on this point by the Fifth Circuit under Federal Rules of Civil Procedure, Rule 61 (484 F.2d at 402-403) do not present any significant issue for review. The District Court considered the Union's argument of "justification" and rejected it, as had the arbitrator. Further, the District Court's refusal to consider the testimony of Johnson after determining that the same testimony had been presented to the arbitrator was correct, and, indeed, the very same evidence was already before the District Court in the form of an affidavit submitted by the Union's Business Representative in support of the Union's Opposition to Motion for Summary Judgment.[3]

CONCLUSION

The decision of the Fifth Circuit in this case complies with the decisions of this Court in applying federal substantive law to this action arising under Section 301 of the Act. The decision of the Fifth Circuit is further correct in refusing to extend the protection of Section 502 of the

[3] Original Record, p .20, Exhibit A.

Act to the Union's strike and picketing in this case, and the exclusion of the testimony of the Union's Business Representative was, at most, harmless error within the meaning of Rule 61 of the Federal Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, the Company respectfully prays that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. J. HARPER II
L. G. CLINTON, JR.

Of Counsel,

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Bank of the Southwest Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I, A. J. Harper II, one of the Attorneys for Respondent Pence Construction Corporation, do hereby certify that on this 13th day of December, 1973, a true and correct copy of the foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on the following by placing same in the United States mail, postage prepaid:

Mr. W. Arthur Combs
Combs & Archer
1220 Americana Building
Houston, Texas 77002

A. J. HARPER II